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Stephen R. Lohman

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NOTES

THE SPEEDY TRIAL ACT OF 1974: DEFINING THE SIXTH AMENDMENT RIGHT

The sixth amendment right to a speedy trial¹ has been a difficult right to define and implement. Most elusive has been a determination of what constitutes unwarranted delay in trial and what remedies are appropriate when such delay occurs. Added to these difficulties is the serious practical problem of implementing the sixth amendment right in the face of mounting court congestion and the seemingly inescapable delays in criminal litigation.²

Courts and legislatures have provided varying solutions to these problems. Yet these variances only emphasize the continuing need for a uniform definition of the sixth amendment right. Recently, Congress took a step which, at least in the federal system, may provide such a definition.

In January 1975, Congress enacted the Speedy Trial Act of 1974.³ The Act was the culmination of various proposals for speedy trial legislation which had been considered in several sessions prior to the Ninety-third Congress.⁴ As enacted, the legislation mandates that by 1980, in all federal

1. U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"

2. Data presented to the Senate Subcommittee on Constitutional Rights in 1973 showed that delays from arrest to indictment in 15 federal district courts ranged from a low of 13.1 days to a high of 153.4 days, with a median delay of 50.6 days. *Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 217 (1973). A study by the Administrative Office of the United States Courts shows that in 1973, in federal district courts, there were 5,114 cases, which did not involve fugitive defendants, pending longer than six months. Of these, 2,343 had been pending six to twelve months, 2,418 one to two years, and 353 over three years. *DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 436* (1973). Data from all circuits showed that a median time interval from filing to disposition in criminal jury trials ranged from a low of 3.7 months to a high of 10.8 months. *Id.* at 412-15.

3. 18 U.S.C.A. §§ 3161-74 (Supp. Feb. 1975) [hereinafter cited as Speedy Trial Act]. Aside from the provisions regarding speedy trial, the Act also contains detailed provisions requiring planning groups to be formed and reports to be filed from all districts in order to ascertain the most efficient and effective methods of meeting the time limits. Speedy Trial Act §§ 3165-74.

4. See 120 CONG. REC. S 13,172 (daily ed. July 23, 1974); *Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); *Hearings on S. 895 Before the Subcomm. on Constitutional*

district courts the period of time between arrest and trial, subject to a variety of excludable periods of delay,⁵ will not exceed 100 days.⁶ Significantly, the time limits set in the bill will be enforced by mandatory dismissal of criminal charges, on defendant's motion, when the limits are exceeded.⁷

There is little doubt that the Speedy Trial Act represents a potentially significant change in the criminal justice system. This article will describe the provisions of the Act and discuss them in the context of current interpretations of the right to a speedy trial, focusing primarily on how the Act compares with constitutional and prior statutory definitions of speedy trial.

I. TIME LIMITS AND SANCTIONS

The major impact of the Speedy Trial Act is due to its imposition of time limits with respect to three separate intervals in the period from arrest to trial.⁸ The first limit requires that any information or indictment be filed within 30 days from the date on which the accused was arrested or served with a summons in connection with the offense.⁹ The second limit requires that arraignment of the accused be held within 10 days of either the filing date of the information or indictment, or of the date the accused is ordered held to answer and appears before a judicial officer in the court in which the charge is pending, whichever date occurs last.¹⁰ The third time limit requires that,

Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1971). Senator Sam Ervin was the primary force behind speedy trial legislation in the Senate. Representative John Conyers was the floor manager for the Act in the House of Representatives.

5. See note 16 *infra*.

6. Speedy Trial Act §§ 3161(b), 3161(c).

7. *Id.* §§ 3162(a)(1), 3162(a)(2).

8. *Id.* §§ 3161(f), 3161(g), 3163(a), 3163(b). The time limits will be phased in after the initial effective date of July 1, 1975. In the first 12 months following that date there will be no time limits imposed. During the second 12 months, the time limits from arrest to indictment and indictment to trial will be 60 and 180 days respectively. These limits will decrease the next year to 45 and 120 days, and the following year to 35 and 80 days respectively. In July 1979, the limits will be set at their final levels of 30 and 60 days. The 10-day limit on the period from indictment to arraignment will go into effect in July 1976. The Act also provides "interim limits" for the period beginning 90 days after the effective date of July 1, 1975 and ending the day before the final limits go into effect. The limits apply to those persons held in pretrial detention and those classified as "high risk" by the government. Trial will be required to begin within 90 days of either detention or classification. *Id.* § 3164. See generally note 58 & accompanying text *infra*.

9. Speedy Trial Act § 3161(b). A 30-day extension of this time limit is authorized for districts in which no grand jury has been in session during the initial 30-day period. *Id.*

10. *Id.* § 3161(c).

where a plea of not guilty is entered, trial must begin within 60 days from the date of arraignment.¹¹

The time limits mandated by the Act are intended to achieve two basic goals. The first is to define and implement the sixth amendment right to a speedy trial in such a way as to make the right meaningful for criminal defendants.¹² In considering the Act, Congress concluded that the case law and court rules dealing with speedy trial had been inadequate in achieving this goal.¹³ A second basic goal of the Act is to benefit the public by making the deterrent value of punishment more substantial through swift and efficient justice.¹⁴ At the same time, swift imposition of punishment would

11. *Id.* The Speedy Trial Act deals only with pretrial delay. Delay during trial and appellate review is not affected by the Act, though such delay has been the subject of limits recommended by a government commission studying speedy trial. A task force report issued by the President's Commission on Law Enforcement and Administration of Justice in 1967 recommended that a limit of nine months be set on the entire criminal justice process, including appellate review. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 84-90 (1967).

12. See H.R. REP. NO. 93-1508, 93d Cong., 2d Sess. 11 (1974). The House Report contains a statement of the purpose of the legislation, information regarding the Act's history, the major issues considered in its passage, and a general description of the provisions of the Act.

13. See 120 CONG. REC. S 13,176-77 (daily ed. July 23, 1974); H.R. REP. NO. 93-1508, *supra* note 12, at 11. Both the Senate and House Committees which reviewed the legislation believed that the delays which existed were not likely to be reduced through rules in force at that time. Both committees perceived speedy trial legislation as necessary in order to prod the judicial system into analyzing and resolving the causes of delay. See Letter from Representative John Conyers to Representative Peter Rodino, Nov. 18, 1974, reprinted in 4 U.S. CODE CONG. & AD. NEWS 7448 (1974). But see note 73 *infra*.

14. See 120 CONG. REC. H 12,556 (daily ed. Dec. 20, 1974) (remarks of Congressman Sarbanes). See also *Dickey v. Florida*, 398 U.S. 30, 39 (1970) (Brennan & Marshall, JJ., concurring); *United States ex rel. Solomon v. Mancusi*, 412 F.2d 88, 92 (2d Cir. 1969) (Feinberg, J., dissenting), in which the suggestion is made that the deterrent value of punishment may be substantially lost through extended delays between arrest and trial. The classic theoretical view that punishment acts as a deterrent to crime embraces the notion that the time lapse between commission of the offense and imposition of punishment is important. C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 74 (2d ed. 1819); J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. 14 (1948). This theory holds that the closer in time the two events occur, the stronger and more lasting their association will be. C. BECCARIA, *supra*, at 75. Other theories of punishment, which do not view its primary function as one of deterrence, place relatively little importance on the temporal proximity between crime and punishment. See generally PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT (G. Ezorsky ed. 1972); THEORIES OF PUNISHMENT (S. Grupp ed. 1971). There has been a considerable amount of empirical research in the field of psychology which has explored the effects of punishment on human behavior. See generally PUNISHMENT AND AVERSIVE BEHAVIOR (B. Campbell & R. Church eds. 1969).

reduce the time and opportunity available for persons released pending trial to commit other offenses.¹⁵

The time limits established in the Act are subject to numerous periods of "excludable delay"¹⁶ which will not be counted toward the statutory time limit. Although the Act specifically states that the excludable delays listed are not exhaustive,¹⁷ given their wide scope and detailed treatment, they will probably comprise the bulk of those deemed legitimate by the courts.

A second significant provision of the Act is the section detailing sanctions for failure to meet the requisite time limits. The Act provides that on defendant's motion, the court must dismiss the charges against the accused if the time limit, excluding all legitimate delay, has expired.¹⁸ The Act does not require, however, that the dismissal act as a bar to future prosecution.¹⁹ Rather, it leaves that determination to the trial judge, subject to a number of guidelines.²⁰ Dismissal on expiration of the time limits is characterized as mandatory but not automatic,²¹ since the defendant must make a timely

15. See H.R. REP. NO. 93-1508, *supra* note 12, at 15-16; 120 CONG. REC. S 13,174 (daily ed. July 23, 1974). Both the House and Senate Committees, in explaining how the time limits were set, cited a government study which found that in 1970, a "dangerous" defendant on pretrial release was more likely to commit another crime if he were not brought to trial within 60 days of arrest. National Bureau of Standards, *Compilation and Use of Criminal Court Data in Relation to Pre-trial Release of Defendants: Pilot Study*, Technical Note No. 535, 165 (Aug. 1970). This finding was based on a sample of only 47 defendants, however, and the authors themselves caution against attaching great significance to the results. *Id.* at 103-07.

16. Speedy Trial Act § 3161(h). The excludable delays cover such areas as delay resulting from a determination of the competency of the accused to stand trial, delay resulting from trials on other charges against the accused, and delays for interlocutory appeals. The trial judge is also allowed to grant continuances for nonenumerated reasons according to his own discretion, but the Act requires that he find that the ends of justice which are served by a continuance will outweigh the best interests of the public and the defendant in a speedy trial. *Id.* § 3161(h)(8).

17. *Id.* § 3161(h)(1).

18. *Id.* § 3162. Lack of preparation by the government is not considered legitimate delay. In an unusual provision, the Act provides that fines be assessed against the prosecution or defense counsel if either acts willfully to delay trial without legitimate cause. *Id.* § 3162(2)(b).

19. *Id.* § 3162(a)(2). The House version of the Act originally required that dismissal be with prejudice, but this language was amended on the floor of the House to allow the trial judge discretion on the issue. See H.R. REP. NO. 93-1508, *supra* note 12, at 9; 120 CONG. REC. H 12,571-72 (daily ed. Dec. 20, 1974). The Senate version of the bill allowed reprosecution under "exceptional circumstances." See 120 CONG. REC. S 13,176 (daily ed. July 23, 1974).

20. Aspects which the Act requires the courts to consider are the seriousness of the offense, the circumstances which led to the dismissal, and the effect of reprosecution on the administration of the Act and on the administration of justice. Speedy Trial Act § 3162(a)(1).

21. See H.R. REP. NO. 93-1508, *supra* note 12, at 37.

motion to dismiss or waive his right to a dismissal.²²

Many provisions of the Speedy Trial Act are responses to, and in some cases models of, earlier attempts to define the right to a speedy trial. Previous efforts have come from the common law, federal and state statutes, and court rules. In order to adequately evaluate the meaning and effect of the Speedy Trial Act, it is necessary to review these prior attempts at definition.

II. JUDICIAL INTERPRETATION OF THE RIGHT TO A SPEEDY TRIAL

The Supreme Court has taken the opportunity to define the right to a speedy trial in only a limited number of cases.²³ In these cases, the Court stressed the unique and amorphous quality of the right in comparison to others guaranteed by the Constitution.²⁴ Repeatedly stating that there is no constitutional basis for quantifying the speedy trial right, the Court has held it a matter which must be determined on a case by case basis, a right necessarily relative, and impossible to define in mathematical terms.²⁵

The uniqueness of the right to a speedy trial, relative to other constitutional rights, arises from a number of factors. Speedy trials not only benefit the individual defendant but also benefit society in general, due to the deterrent value of swift punishment and the value of a public perception of efficient, responsible justice.²⁶ The right to a speedy trial is unique also in that a defendant will often benefit from a delay which is in direct violation of that right. A defendant who perceives delay as beneficial to his case may

22. Speedy Trial Act § 3162(2).

23. *Strunk v. United States*, 412 U.S. 434 (1973); *Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Marion*, 404 U.S. 307 (1971); *Dickey v. Florida*, 398 U.S. 30 (1970); *Smith v. Hooey*, 393 U.S. 374 (1969); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *United States v. Ewell*, 383 U.S. 116 (1966); *Smith v. United States*, 360 U.S. 1 (1959); *Pollard v. United States*, 352 U.S. 354 (1957); *Beavers v. Haubert*, 198 U.S. 77 (1905); *see also* Annot., 21 L. Ed. 2d 905 (1969).

24. *See, e.g., Barker v. Wingo*, 407 U.S. 514, 519-22 (1972).

25. *See id.* at 522; *United States v. Ewell*, 383 U.S. 116, 120 (1966). The Court in *Barker* rejected the invitation to set a definite time limit on the sixth amendment right. The Court felt that setting such a limit was more than the Constitution required and should more appropriately be done by the legislative branch. 407 U.S. at 523. *But cf. United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 4 (1971), in which the United States Court of Military Appeals held that a presumption of a denial of speedy trial would arise when an accused is held in pretrial confinement for longer than 90 days. The court based its holding on article 10 of the Uniform Code of Military Justice, which provides in pertinent part: "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken . . . to try him or to dismiss the charges and release him." 10 U.S.C. § 810 (1970).

26. *See Barker v. Wingo*, 407 U.S. 514, 519 (1972); *Dickey v. Florida*, 398 U.S. 30, 42-43 (Brennan & Marshall, JJ., concurring); cases and material cited note 14 *supra*.

acquiesce in the violation of his own constitutional right to a speedy trial. A realization of this factor has led to a requirement in many courts that the defendant affirmatively demand a speedy trial or be deemed to have waived his right.²⁷

*Barker v. Wingo*²⁸ offers the Supreme Court's most definitive statement to date on how courts should determine whether a defendant has been afforded a speedy trial. Consistent with its view that the question cannot be answered through the use of a simple formula, the Court refused to set strict guidelines and time limits for use in determining violations of the right. Rather, the Court suggested that an analysis of the delay be made in each case through a balancing process involving four considerations: length of delay, reasons for the delay, whether the defendant has been prejudiced, and whether the defendant has asserted his right to a speedy trial.²⁹ Each factor was described individually by the Court in an effort to make the suggested analysis clear.

The *Barker* Court viewed the length of delay as basically a "triggering mechanism" which would initially determine whether a court would undertake to consider a speedy trial claim at all.³⁰ As a practical matter, length of delay is considered in this initial stage and then again as one of the four factors in analyzing whether the right has been denied.³¹ Whether the length of the delay will, in either determination, be sufficient to support the defendant's claim of a denial of speedy trial is completely dependent upon the circumstances of the case. The only generalization which can be made is that the delay must be substantial. The courts have been extremely tolerant in what they view as excessive delay.³²

Aside from merely ascertaining the length of delay, courts must also look to the reasons for which the delay occurred. The Supreme Court has stated that delay must not be so purposeful on the government's part as to obtain

27. See text accompanying notes 42-45 *infra*. See generally *Dickey v. Florida*, 398 U.S. 30, 49 (Brennan & Marshall, JJ., concurring), in which Justice Brennan criticized this "demand-waiver" rule on the ground that delay does not inherently benefit the defendant any more than the prosecution, and not all defendants perceive delay as being helpful to them.

28. 407 U.S. 514 (1972).

29. *Id.* at 530. The Court stated that none of the four factors cited is either required or sufficient by itself for finding a violation of speedy trial. Rather, it is suggested that courts balance these factors delicately and abstain from strict rules. *Id.* at 533.

30. *Id.* at 530.

31. See Dunahoo & Sullins, *Speedy Justice*, 22 DRAKE L. REV. 266, 269 (1973).

32. See, e.g., *Barker v. Wingo*, 407 U.S. 514 (1972) (five year delay from arrest until trial is not a per se denial of speedy trial); *United States v. Infanti*, 474 F.2d 522 (2d Cir. 1973) (28 months between arrest and trial is "not extraordinary").

undue advantage over the defendant.³³ A finding of such purposeful delay is rare, since considerable deference is shown by the courts toward any legitimate government excuse.³⁴ A standard by which to judge the legitimacy of delay has not yet been developed, at least in part because of this willingness to accept almost any rationale. Some authorities have suggested that a standard of reasonableness be used and that any negligent delay on the prosecutor's part not be considered legitimate.³⁵

The important question of whether general congestion in the courts should be viewed as a legitimate reason for delay under the *Barker* analysis is unresolved. The Supreme Court has indicated that although congestion should be counted against the government, it should not be weighed as heavily as purposeful delay.³⁶

The final two factors in the speedy trial analysis are perhaps the most crucial. The requirements that the alleged delay be prejudicial and that the defendant timely assert his speedy trial right constitute the main hurdles in proving a denial of speedy trial. Though the Supreme Court has stressed that a demonstration of prejudice is not essential to prove such a denial,³⁷ many courts have treated it as just such an element.³⁸ According to the Court, a determination of whether prejudice has resulted from delay should not be limited to a mere review of whether the defendant has served an extended period in pretrial detention or has been hampered in preparing his defense, though certainly these are key factors. Prejudice may also result from more subtle forces such as anxiety over long-pending charges, public accusation and scorn, or impositions on freedom of movement and speech.³⁹ Such

33. *Pollard v. United States*, 352 U.S. 354, 361 (1957).

34. *See, e.g., United States v. DeTienne*, 468 F.2d 151 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973) (delay caused by search for codefendant); *United States ex rel. Solomon v. Mancusi*, 412 F.2d 88 (2d Cir.), *cert. denied*, 396 U.S. 936 (1969) (inadvertent delay caused by confusion over appointment of defense counsel). *But see Arrant v. Wainwright*, 468 F.2d 677 (5th Cir. 1972), *cert. denied*, 410 U.S. 947 (1973) (delay caused by government attempts to prevent a witness favorable to defendant from testifying was purposeful delay); *United States v. Hanna*, 347 F. Supp. 1010 (D. Del. 1972) (delay caused by government attempts to coerce defendant into testifying against another was not legitimate).

35. *See Note, The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 865 (1957); *cf. Dickey v. Florida*, 398 U.S. 30, 47-52 (1970) (Brennan & Marshall, JJ., concurring). Even if a standard of reasonableness were adopted, however, it would seem to add little to the definition of what delay is or is not acceptable.

36. *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

37. *See Moore v. Arizona*, 414 U.S. 25, 26 (1973).

38. *See, e.g., United States v. DeTienne*, 468 F.2d 151 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973); *United States ex rel. Solomon v. Mancusi*, 412 F.2d 88 (2d Cir.), *cert. denied*, 396 U.S. 936 (1969).

39. *See United States v. Marion*, 404 U.S. 307, 331 (1971) (Douglas, J., concurring); *United States v. Ewell*, 383 U.S. 116, 120 (1966).

prejudice is neither easily measured nor easily demonstrated, yet courts have generally demanded a concrete showing of actual harm.⁴⁰ In addition, some courts seem reluctant to accept at face value what the defendant alleges to be prejudice, and they will at times look beyond the allegations to assess, in their own judgment, what harm has occurred.⁴¹

The requirement suggested by the *Barker* Court that there should be a timely assertion of the speedy trial right is represented in the rule of many courts that, absent a demand by the defendant for a speedy trial, the right is deemed to have been waived.⁴² Although the *Barker* Court itself rejected a strict adherence to this "demand-waiver" rule because of its feeling that such a rule was inconsistent with the accepted standard for waiver of other important constitutional rights,⁴³ the Court stressed that a defendant's assertion of the right will carry strong evidentiary weight in determining whether a speedy trial has been denied.⁴⁴ Failure to demand speedy trial or to vigorously oppose delays requested by the prosecution would make it difficult for the accused to assert later that he was denied his sixth amendment right.⁴⁵

Two other issues deemed essential to determining the scope and effect of the sixth amendment right to a speedy trial were addressed by the Supreme

40. See cases cited note 38 *supra*; *Leonard v. Vance*, 349 F. Supp. 859 (S.D. Tex. 1972). Concrete proof of actual prejudice has in the past included such things as the death or unavailability of a material witness, *see id.* at 862, loss of memory about an important event, *see id.*, or destruction of evidence, *see Dickey v. Florida*, 398 U.S. 30, 35-36 (1970).

41. See *United States v. DeTienne*, 468 F.2d 151 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973), in which the defendant alleged prejudice caused by loss of memory, oppressive pretrial incarceration, and anxiety over pending charges. The court responded "that generally inferable prejudice, unenhanced by tangible impairment of the defense function and unsupported by a better showing on the other factors than was made here, does not alone make out a deprivation of the right to a speedy trial." *Id.* at 158.

42. See, e.g., *United States v. Parish*, 468 F.2d 1129 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 957 (1973); *United States v. DeTienne*, 468 F.2d 151 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973); *Dunahoo & Sullins*, *supra* note 31, at 267-68.

43. 407 U.S. at 525. The Court has previously defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Additionally, the Court has held that it is impermissible to presume a waiver from a silent record. *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

44. 407 U.S. at 531-32. Courts considering speedy trial issues after *Barker* have complied with this language by continuing to attach considerable significance to whether a defendant has or has not demanded a speedy trial. See, e.g., *United States v. Weber*, 479 F.2d 331, 333 (8th Cir. 1973); *United States v. Saglimbene*, 471 F.2d 16, 18 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *United States v. Dornau*, 356 F. Supp. 1091, 1096 (S.D.N.Y. 1973).

45. See 407 U.S. at 531-32; *United States v. Parish*, 468 F.2d 1129 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 957 (1973).

Court in *United States v. Marion*⁴⁶ and *Strunk v. United States*.⁴⁷ In *Marion*, the Court held that the speedy trial clause had no application prior to the point in time when an individual becomes an "accused."⁴⁸ In practical terms this generally means that the right attaches when the defendant is arrested and charged at a preliminary hearing, or when an indictment or information is filed. The Speedy Trial Act follows this formulation by providing that the statutory right also attaches at this point.⁴⁹ A defendant thus has no basis under either the Act or the sixth amendment for complaining of delay after the offense is committed but before he is formally charged.⁵⁰

The second issue, addressed in *Strunk*, concerned the Court's belief that dismissal of the charges against the defendant is the only remedy for a violation of a speedy trial.⁵¹ Pointing out that the right, once lost, is irretrievable, the Court in *Strunk* rejected the "compensatory remedy" that had been fashioned by the lower court.⁵² Any remedy short of dismissal would not be appropriate in light of the importance of the right and the prejudice sustained by its violation.⁵³ Although the importance of the right is also implicit in the Speedy Trial Act, the remedy for a statutory violation may not be as severe. The Act requires that the charges be dismissed, but it allows

46. 404 U.S. 307 (1971).

47. 412 U.S. 434 (1973).

48. 404 U.S. at 314-15. Statutes of limitation for particular crimes remain the primary protection against prearrest or preindictment delay, since they require that if a person is to be charged at all, he must be charged within a certain time.

49. Speedy Trial Act §§ 3161(b), 3161(c).

50. *But see* *United States v. Marion*, 404 U.S. 307, 326 (1971) (Douglas, J., concurring); *Dickey v. Florida*, 398 U.S. 30, 39 (1970) (Brennan & Marshall, JJ., concurring). These concurring opinions suggest that prejudice is as likely to result from delay before formal accusation as after. They also suggest that if the speedy trial right is to be fully realized it must apply to all stages of the process.

51. 412 U.S. at 440. The *Strunk* case involved a defendant charged with transporting a stolen auto across state lines. There was a 259-day delay between indictment and arraignment of the accused.

52. *See* 412 U.S. at 439-40. Instead of dismissing the charges and releasing the defendant, who had been tried and found guilty, the court of appeals ordered the district court to credit him with the time spent in pretrial confinement and to reduce his sentence by a corresponding amount. *United States v. Strunk*, 467 F.2d 969 (7th Cir. 1972). *See also* Wideikis, *Rejection of the Compensatory Remedy with Respect to the Right to a Speedy Trial: The Conclusion of the Marion-Barker-Strunk Trilogy*, 7 J. MARSHALL J. 253, 259 (1973).

53. It is generally held that a dismissal based on a constitutional violation is a bar to further prosecution for the same offense. *See United States v. Clay*, 481 F.2d 133 (7th Cir.), *cert. denied*, 414 U.S. 1009 (1973); *Mann v. United States*, 304 F.2d 394 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962); Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 860 (1957). It is suggested, however, that a dismissal based on a violation of a speedy trial statute should not act as a bar. *Id.* at 860.

the trial judge the discretion of making the dismissal with or without prejudice.⁵⁴

Along with the judicial interpretation of the sixth amendment speedy trial clause, there has been considerable effort by state legislatures to define the speedy trial right found in all state constitutions.⁵⁵ These efforts may profitably be compared with the Speedy Trial Act as a method of assessing the Act's strengths and weaknesses. In addition, this comparison demonstrates some of the differing perceptions of the state and federal legislatures as to what the speedy trial right entails.

III. STATE PROVISIONS

The time limits on pretrial delay found in most state speedy trial statutes are set according to varying criteria. Some statutes divide the time from arrest to trial into two periods, as does the Speedy Trial Act, and require that delays between arrest, indictment, and trial not exceed certain limits.⁵⁶ Some require that misdemeanor cases be brought to trial more quickly than felony cases.⁵⁷ Others mandate shorter time limits when the accused is held in pretrial detention.⁵⁸

Most states still define their time limits with reference to the number of terms of the court which has jurisdiction over the offense,⁵⁹ reflecting the fact that many state courts do not sit continuously throughout the year. Those states which do set time limits by number of days or months vary considerably in the amount of delay allowed.⁶⁰

54. Speedy Trial Act § 3162(a).

55. See, e.g., CONN. CONST. art. 1, § 8; IOWA CONST. art. 1, § 10; MD. DECLARATION OF RIGHTS art. 21; VA. CONST. art. 1, § 8; W. VA. CONST. art. 3, § 14. Aside from the guarantees found in state constitutions, the Supreme Court has held that the speedy trial clause applies to the states through the fourteenth amendment due process clause. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

56. See, e.g., CAL. PENAL CODE § 1382 (West 1970) (15 days from time held to answer to filing of information or indictment, 60 days between indictment or information and trial); NEV. REV. STAT. § 178.556 (1973) (same limits as California).

57. See, e.g., CAL. PENAL CODE § 1382 (West 1970); FLA. R. CRIM. P. 3.191(a)(1).

58. See, e.g., ARK. STAT. ANN. §§ 43-1708, 43-1709 (1964) (before end of second term of court after indictment); ILL. REV. STAT. ch. 38, §§ 103-5 (1971) (120 days from date held in custody). See generally note 8 *supra*.

59. See, e.g., ARK. STAT. ANN. § 43-1708 (1964); MISS. CODE ANN. § 99-17-1 (1972); W. VA. CODE ANN. § 62-3-21 (1966). See also ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL 14 (Approved Draft, 1968), which expresses the view that this method of expressing limits is inferior to the use of days or months since the latter is easier to understand and calculate.

60. Compare CAL. PENAL CODE § 1382 (West 1970) (75 days from arrest to trial) with N.M. STAT. ANN. § 41-23-37 (Supp. 1973) (six months from arrest or filing of indictment to trial).

Another consideration of state speedy trial statutes concerns the reasons for delay which may be considered legitimate. Such reasons have proven difficult to define statutorily and most states have resorted to a general "good cause" definition;⁶¹ thus, any delay for which the government can demonstrate good cause is excluded from the time limit. Few states have attempted to enumerate all the legitimate reasons for delay,⁶² and no state statute has enumerated as many reasons as has the Speedy Trial Act.⁶³ Where the state statute defines legitimate delay in only general terms, courts have found it difficult to define the criteria of such delay. A common issue is whether delay caused by court congestion can legitimately be excluded from the statutory period. As in the federal courts, this question is still unresolved in most states. Few statutes explicitly deny court congestion the status of a legitimate delay.⁶⁴

An additional factor which some state statutes consider is whether a demand by the defendant is necessary to start the statutory time period running. After the Supreme Court's decision in *Barker*,⁶⁵ states could not adhere to a strict demand-waiver rule with regard to the constitutional right, but they were not precluded from requiring that a demand be made in order to assert the statutory right. Those states which do require a demand⁶⁶ may hold that only the statutory right to dismissal is waived when demand is not made; the constitutional right remains intact.⁶⁷ Most statutes are relatively strict in viewing a delay initiated by the defendant as fatal to his claim of denial of speedy trial. That the time limits do not include defendant-initiated delay is explicitly stated in most statutes.⁶⁸

61. See, e.g., ALASKA STAT. § 12.20.050 (1972); WASH. REV. CODE ANN. § 10.37.020 (1961).

62. See ABA PROJECT, *supra* note 59, at 15. The ABA recommended that the basic policy considerations involved in determining what events justify extension of the statutory limits should be set forth in the statute or rule.

63. The enumerated delays in the Speedy Trial Act, though not intended to be exhaustive, are considerably more detailed and comprehensive than most state statutes. See note 16 *supra*.

64. One of the few states which does exclude court congestion as legitimate delay is Florida. The Florida rule provides that neither court congestion nor lack of preparation by the prosecution shall constitute "exceptional circumstances" which justify delay. FLA. R. CRIM. P. 3.191(f).

65. See text accompanying notes 42-45 *supra*.

66. See, e.g., IOWA CODE § 795.1 (1975). Many state statutes are silent on whether a demand is necessary, leaving the courts to require it as a matter of statutory interpretation.

67. See Dunahoo & Sullins, *supra* note 31, at 279.

68. See, e.g., ALASKA STAT. § 12.20.050(a)(3) (1972); CAL. PENAL CODE § 1382(2) (West 1970); ILL. REV. STAT. ch. 38, § 103-5(a) (1971); N.M. STAT. ANN. § 41-23-37(d) (Supp. 1973); W. VA. CODE ANN. § 62-3-21 (1966).

The final aspect which many state statutes address is the remedy available to a defendant whose right to a speedy trial has been infringed. There are a number of variations among the different states on the basic remedy of dismissal. The simplest differentiation drawn is between dismissal with and without prejudice. Very few states require that the dismissal for statutory violation be a bar to future prosecution,⁶⁹ though it has been suggested that such a restriction is a necessary element of any scheme which attempts to place a duty on the prosecution to meet the time limits.⁷⁰ Many statutes are silent as to whether a dismissal will be with or without prejudice, leaving the matter to the court's discretion. Some statutes state that the dismissal will act as a bar to future prosecution if the crime charged is a misdemeanor, but not if it is a felony.⁷¹

Unlike the case in which the interpretation of the sixth amendment is drawn into question, state statutes rarely require a showing of prejudice as a prerequisite for finding a violation of the statutory speedy trial requirement. The time limits set in the statute represent the state legislature's judgment that any unnecessary delay beyond that time will be presumed harmful to the defendant. In this way, the statutory definition is a significant improvement over the constitutional speedy trial clause in that the statute removes the defendant's burden of having to show prejudice, and thus makes it considerably easier for him to prove his case.

IV. RULES DEFINING SPEEDY TRIAL

One of the questions faced by the House Judiciary Committee in its consideration of the Speedy Trial Act was whether such legislation was really necessary.⁷² One of the strongest negative replies came from the Justice Department, which based its reply in part on the development of court plans to reduce pretrial delay under rule 50(b) of the Federal Rules of Criminal Procedure.⁷³ The Committee subsequently rejected the Justice Department's

69. See NEV. REV. STAT. § 178.562 (1973); FLA. R. CRIM. P. 3.191(h)(1); W. VA. CODE ANN. § 62-3-21 (1966).

70. See Note, *Speedy Trial Schemes and Criminal Justice Delay*, 57 CORNELL L. REV. 794, 812 (1972). The ABA has taken the position that if the government is free to recommence trial on the same charges, the right to a speedy trial will be largely meaningless. See ABA PROJECT, *supra* note 59, at 40-41.

71. See, e.g., ALASKA STAT. § 12.20.050(a) (1972); CAL. PENAL CODE § 1387 (West 1970); IOWA CODE § 795.5 (1971).

72. See generally H.R. REP. NO. 93-1508, *supra* note 12.

73. See Letter from Attorney General William Saxbe to Representative Peter Rodino, Nov. 15, 1974, reprinted in 4 U.S. CODE CONG. & AD. NEWS 7446 (1974). Rule 50(b) provides in pertinent part that "each district court shall conduct a continuing study of the administration of criminal justice in the district court . . . and shall prepare

argument on the basis that plans submitted under the rule had failed to provide a uniform definition of speedy trial and had only encouraged perpetuation of the status quo.⁷⁴

It might also have been argued that speedy trial legislation was unnecessary because of rule 48(b) of the Federal Rules of Criminal Procedure, which provides for dismissal of charges when there is "unnecessary delay" in obtaining an indictment or bringing a defendant to trial.⁷⁵ Courts have interpreted rule 48(b) in differing ways. Some view it as simply a restatement of, and substantially coterminous with, the speedy trial clause of the Constitution.⁷⁶ Other courts have viewed rule 48(b) as a tool to control their own calendar and the cases they hear.⁷⁷ The trial judge can threaten the government with dismissal under the rule if he believes that a particular case is not progressing at a proper pace. In this context, the rule has been characterized as setting stricter limits on delay than does the speedy trial clause, since the court may dismiss a case under the rule without undergoing the elaborate *Barker* sixth amendment analysis.⁷⁸ On this basis, application of rule 48(b) has been held to be within the discretion of the court in the particular circumstances of each case. Additionally, denial of a motion to dismiss under the rule, when there is no constitutional violation, will not be overturned in the absence of an abuse of discretion.⁷⁹

a plan for the prompt disposition of criminal cases" The opinion of the Justice Department was that the procedure called for in rule 50(b) was the appropriate way to proceed and was proving successful in reducing pretrial delay.

74. See H.R. REP. NO. 93-1508, *supra* note 12, at 12-13; Letter from Representative John Conyers to Representative Peter Rodino, *supra* note 13.

75. FED. R. CRIM. P. 48(b) provides in pertinent part: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information . . . or . . . in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint." See also FED. R. CRIM. P. 32(a), which provides that "[s]entence shall be imposed without unreasonable delay."

76. See *United States v. Favaloro*, 493 F.2d 623, 626 (2d Cir. 1974); *United States v. Infanti*, 474 F.2d 522, 527 (2d Cir. 1973); *United States v. Singleton*, 460 F.2d 1148, 1152 (2d Cir. 1972). In each of these cases, the court perceived the defendants' rights under the sixth amendment and rule 48(b) as being substantially the same.

77. See *United States v. Clay*, 481 F.2d 133, 135 (7th Cir.), *cert. denied*, 414 U.S. 1009 (1973); *Mann v. United States*, 304 F.2d 394, 397-98 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962).

78. See *Mathies v. United States*, 373 F.2d 312, 314-15 (D.C. Cir. 1967); *Mann v. United States*, 304 F.2d 394, 397-98 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962); FED. R. CRIM. P. 48(b) (Advisory Committee Notes). The latter rule is "a restatement of the inherent power of the court to dismiss a case for want of prosecution." *Id.*

79. See *United States v. DeCosta*, 435 F.2d 630, 633 (1st Cir. 1970); *United States v. Cartano*, 420 F.2d 362, 363 (1st Cir.), *cert. denied*, 397 U.S. 1054 (1970). In each case the defendant was appealing a denial of his motion to dismiss under rule 48(b). The court of appeals felt that the trial judges' rulings on the motions were discretionary and that neither had abused that discretion.

The somewhat erratic way in which the rule has been interpreted has resulted in confusion over the circumstances under which a rule 48(b) motion to dismiss is appropriate. Many courts have treated the motion simply as a speedy trial issue and have analyzed the claim under the traditional *Barker* guidelines.⁸⁰ Other courts have treated the motion as a request to review the reasons for prosecutorial delay and to determine whether such delay was so unnecessary as to warrant dismissal of the charges as a matter of judicial administration.⁸¹

Under rule 48(b), then, a defendant finds little more definitive guidance on what constitutes a speedy trial than was provided by rule 50(b). Neither improves substantially on the sixth amendment speedy trial clause, and courts have continued to seek more effective ways of defining the right to a speedy trial.

In a unique effort, the United States Court of Appeals for the Second Circuit created its own set of rules "regarding prompt disposition of criminal cases."⁸² Exercising its supervisory powers over federal district courts in its circuit, the court mandated that in all cases the government must be prepared to begin trial within six months of the date of arrest, service of summons, detention, or the filing of a complaint, whichever is earliest.⁸³ In cases in which the accused is held in pretrial detention, the government must be prepared to begin trial within 90 days of the date of detention.⁸⁴

The Second Circuit rules vary from state speedy trial statutes and the Speedy Trial Act in a number of ways. Probably the most significant variation is that the Second Circuit rules do not actually require that the trial begin within the time limits, but merely that the prosecution be ready to begin. The rules do not restrict delays caused by congested court calendars and thus leave the defendant with little recourse to fight such delay.⁸⁵

A second important variation in the Second Circuit rules is that the

80. See cases cited note 76 *supra*.

81. Cf. *United States v. Clay*, 481 F.2d 133, 137 (7th Cir.), *cert. denied*, 414 U.S. 1009 (1973); *United States v. McKee*, 332 F. Supp. 823, 826 (D. Wyo. 1971); *United States v. Navarre*, 310 F. Supp. 521, 522 (E.D. La. 1969).

82. 28 U.S.C.A. Appendix, United States Courts of Appeals Rules (Supp. 1975). The rules were announced in *United States ex rel. Frizer v. McManus*, 437 F.2d 1312 (2d Cir. 1971). See generally Comment, *Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, 71 COLUM. L. REV. 1059 (1971). No other circuit has developed speedy trial rules comparable to those of the Second Circuit.

83. 2D CIR. R. 4.

84. *Id.* R. 3.

85. Rules 3 and 4 provide that "the government must be ready for trial" within 90 days or six months respectively. If the government is prepared to begin trial, the defendant has no basis in the rules to contest further delay. See Comment, *supra* note 82, at 1074.

defendant need not make a demand for speedy trial in order to start the time period running.⁸⁶ The defendant need only make a timely motion to dismiss on expiration of the time limits. In addition, the rules do not explicitly require a finding of prejudice in order to dismiss the charges, implying that on expiration of the time limits prejudice will be presumed.⁸⁷

The remedy for violation of the time limits provided by the Second Circuit rules varies according to the situation of the accused when the time limits expire. If the prosecution is not prepared for trial within 90 days when the accused has been held in custody, the accused must be released on bail or his own recognizance, provided he is not charged with a capital offense and there are no "exceptional circumstances" justifying his continued detention.⁸⁸ If the prosecution is not prepared for trial after six months, charges for noncapital offenses must be dismissed.⁸⁹ The rules leave open the question of whether the dismissal will act as a bar to future prosecution for the same offense.

In 1979, when the final limits of the Speedy Trial Act take effect, those limits will be more stringent than the limits set by the Second Circuit rules and the rules will, in effect, be superseded. It may well be, therefore, that the Second Circuit rules will have served merely as a transition into the stricter limits of the Speedy Trial Act.

V. STATUTORY VERSUS CONSTITUTIONAL STANDARDS

One way to evaluate the changes which the Speedy Trial Act will create is to compare the differences between the Act's requirements and those of the sixth amendment, as interpreted by the courts. The most obvious difference is, of course, the time limits which the Act sets.⁹⁰ In every case under the speedy trial clause of the Constitution, the question of whether the alleged delay violated the right has depended on the circumstances of the case, the views of the particular trial judge, and the norm for delay in each particular district.⁹¹ After the time limits of the Speedy Trial Act take effect, the 100-day limit from arrest to trial will be applied uniformly in every federal district court.

86. 2D CIR. R. 8 provides in pertinent part: "A demand by the defendant is not necessary for the purpose of invoking the rights conferred by these rules."

87. See Comment, *supra* note 82, at 1072.

88. 2D CIR. R. 3.

89. *Id.* R. 4.

90. Speedy Trial Act § 3161. See notes 6 & 8 *supra*.

91. The uncertainty regarding what constitutes a speedy trial was one of the primary motivations for the passage of the Speedy Trial Act. See text accompanying notes 12 & 13 *supra*.

A second important difference between a Speedy Trial Act and a sixth amendment analysis is in the delay deemed legitimate. Most, if not all, of the "excludable delays" which the Speedy Trial Act enumerates are delays which would be viewed as legitimate by courts, given the courts' willingness to accept most justifiable delays.⁹² One reason for delay which courts have tended to accept and that the Act specifically excludes, however, is general court congestion.⁹³ In addition, the Act requires that courts be more stringent in granting continuances at the request of either party.⁹⁴ Whereas courts have traditionally allowed continuances at the request of the defendant as a matter of routine, the Act requires the trial judge to grant such a request only when the "ends of justice served by taking such action outweigh the best interest of the public . . . in a speedy trial."⁹⁵

Another significant difference between the right to a speedy trial as defined by the Speedy Trial Act and the right as interpreted under the sixth amendment is that in claiming a violation of this statutory right, the defendant is not required to show that he was prejudiced by the delay. The Speedy Trial Act represents Congress' judgment that delay beyond 100 days, when not excused, is presumptively harmful to the accused.⁹⁶ The accused is thus relieved of the burden of proof in showing prejudicial delay.

Two final differences remain between the Speedy Trial Act and the sixth amendment approaches. The Speedy Trial Act contains no requirement that the defendant demand a speedy trial in order to start the statutory time period running. Under the Act, the accused must only make a timely motion to dismiss prior to a guilty plea or the beginning of trial.⁹⁷ The remedy for a violation of the Act is a dismissal with or without prejudice depending on the discretion of the trial judge.⁹⁸ Dismissal upon violation of the sixth amendment, on the other hand, has usually been interpreted to bar subsequent prosecution.⁹⁹

92. See note 34 & accompanying text *supra*.

93. Speedy Trial Act § 3161(h)(8)(C). As noted earlier in this article, courts have been reluctant to say definitely whether delay caused by court congestion will always be counted against the government. See text accompanying note 36 *supra*.

94. Speedy Trial Act § 3161(h)(8)(A).

95. *Id.* This limitation is an expression of Congress' belief that the public also has an interest, which is distinct from that of the defendant, in achieving speedy trials. See text accompanying notes 14 & 15 *supra*.

96. Cf. Comment, *supra* note 82, at 1072; Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 864 (1957).

97. Speedy Trial Act § 3162(a)(2).

98. *Id.*

99. See note 53 *supra*.

VI. CONCLUSION

In a number of important ways, the Speedy Trial Act implements the sixth amendment right in a manner more favorable to criminal defendants than have prior attempts by the states and by uniform federal and circuit rules. In setting definite time limits, in relieving the accused from the burden of making an affirmative demand for speedy trial, and in no longer requiring that the accused demonstrate prejudicial delay, the Act improves the accused's chances of successfully asserting a sixth amendment claim. In addition, by refusing to excuse delays caused by court congestion, the Act should prod the judicial system into resolving unnecessary, delay-producing problems. Opponents of the Act, however, dispute that it will have this latter effect,¹⁰⁰ suggesting that the failure of Congress to appropriate additional funds for increased court personnel and facilities will negate the Act's good intentions. It has also been proposed that because of its "complicated structure and vague terminology" the Act will produce numerous hearings and appeals which will create rather than reduce delay.¹⁰¹

There are other elements of the Speedy Trial Act which may not be so helpful to the accused. The fact that the trial judge may dismiss the charges without prejudice seems to indicate that at least in major crimes, courts may be reluctant to bar further prosecution on a statutory violation alone, absent a sixth amendment violation. It has also been suggested that in the drive to speed up the criminal justice process, certain rights of the defendant, which in many cases are major causes of delay,¹⁰² may be curtailed.¹⁰³ It seems

100. See H.R. REP. NO. 93-1508, *supra* note 12, at 80 (minority views of Rep. Hutchinson *et al.*). In a letter to the House Judiciary Committee, the Attorney General reported that 92 of the 94 United States Attorneys were opposed to the Act. The Justice Department's position was that the time limits would discourage the prosecution of complicated cases. It also believed the mandatory dismissal sanction would undermine public confidence in the judicial system by releasing accused persons without a determination of guilt or innocence. See Letter from Attorney General William Saxbe to Representative Peter Rodino, Nov. 15, 1974, reprinted in 4 U.S. CODE CONG. & AD. NEWS 7446 (1974).

101. See Letter, *supra* note 100, at 7447. But see Letter from Representative John Conyers to Representative Peter Rodino, *supra* note 13. In a reply to the views of the Justice Department, Representative Conyers suggested that it would be irresponsible for Congress to appropriate additional funds until it could do so intelligently, based on the plans submitted under sections 3166-69 of the Speedy Trial Act. See generally note 3 *supra*. Conyers also stated his belief that there is sufficient provision for legitimate delay in the Act to allow the prosecution of complex cases. In answer to opponents' suggestion that the Act will cause numerous hearings and appeals, Conyers stated that the Act provides for only one motion to dismiss per defendant and that that motion is not intended to be subject to interlocutory appeal. *Id.* at 7448-50.

102. The rights of the accused to have counsel present at preliminary hearings, see *Coleman v. Alabama*, 399 U.S. 1 (1970), and at postindictment lineups for identifica-

extremely improbable, however, that courts will become so efficiency-minded as to begin ignoring either the rights of the accused or the public interest in fair and impartial justice.

A final point should be made in support of the kind of congressional legislation which the Speedy Trial Act represents. By its determination in *Barker* that the Constitution does not require the setting of absolute limits in regard to speedy trial, the Supreme Court deferred to the legislative branch in setting such limits.¹⁰⁴ Congress has made its judgment and has imposed the time limits as goals which courts must meet. Not only should this action force some improvement in the delays which now exist, but it should also force Congress to provide the resources which become necessary in the future to meet the goals it has established.¹⁰⁵

Stephen R. Lohman

tion, see *United States v. Wade*, 388 U.S. 218 (1967), for example, introduce additional delay into the pretrial process.

103. See Note, *Speedy Trial Schemes and Criminal Justice Delay*, 57 CORNELL L. REV. 794, 796 (1972). But see H.R. REP. NO. 93-1508, *supra* note 12, at 14. One might also question the continued vitality of the sixth amendment right in its coexistence with the Speedy Trial Act. Although section 3173 of the Act specifically states that "[n]o provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI", one might legitimately question whether such a claim will ever be successful in the absence of a violation of the statutory time limits. It may well be that what was previously a small possibility of the courts finding a denial of speedy trial within 100 days of arrest has now been substantially erased. See 120 CONG. REC. H 12,554 (daily ed. Dec. 20, 1974) (remarks of Congressman Cohen).

104. See note 25 *supra*.

105. Cf. Note, *Speedy Trial Schemes and Criminal Justice Delay*, 57 CORNELL L. REV. 794, 824 (1972).